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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 721

ISBRANDTSEN-MOLLER COMPANY, INC.,
Petitioner,

—against—

Motorship "TOLEDO" and WILH. WILHELMSEN,
et als., Owners,
Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JAMES W. RYAN,
Counsel for Petitioner.

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Motorship "TOLEDO" and WILH. WILHELMSEN, et als., Owners,

Respondents.

Petition for Writ of Certiorari.

Petitioner, Isbrandtsen-Moller Company, Inc., prays that a writ of certiorari issue to review a decree of the Circuit Court of Appeals for the Second Circuit entered August 16, 1941 (R., p. 488; pursuant to opinion announced in open Court on Monday, July 28, 1941, *The Toledo*, 122 Fed. 2d. 255), affirming a decree in Admiralty of the District Court for the Eastern District of New York (R., p. 454; *The Toledo*, 30 F. Supp. 93), dismissing a libel.

The libel's first cause of action is against respondent shipowners on a charter party for the carriage of a full cargo for petitioner, on a voyage from New York and Philadelphia to European ports, for breach of charter party by delivering an unseaworthy ship. The second cause of action is in tort by petitioner, as bailee of cargo

and assignee of cargo owners' rights, against respondent shipowners and the ship in rem for tendering an unseaworthy ship for loading.

The Circuit Court of Appeals held that the ship was unseaworthy, and that the respondents had breached the charter party, but that petitioner was not a common carrier but a "volunteer", or an agent of third party cargo owners with whom it had contracts, i. e., was a forwarder, and therefore that it could not recover from respondents the excess of the transshipment expense it incurred in forwarding the cargo on a seaworthy vessel over the expense it would have incurred if the unseaworthy ship had carried the cargo.

Jurisdiction.

Jurisdiction is provided by 28 U. S. C., Sec. 347 (a).

Summary and Short Statement of Matter Involved.

So far as careful search has disclosed, this is the first case (aside from *Isbrandtsen-Moller Company* v. *United States*, 300 U. S. 139, in which the point was decided but without discussion of principle involved), that has ever come before this Court involving the question whether the legal status of a charterer who charters the full space on a vessel from a private carrier shipowner and then undertakes himself to issue bills of lading to various American shippers, and act as a common carrier, is that of a common carrier (*i. e.*, an independent contractor) or that of a mere forwarder or broker who brings together the vehicle owner and the owners of the goods and who therefore, in case the vehicle owner supplies an unfit vehicle, cannot recover damages for the vehicle owner's breach of the single shipping contract entered into with

the charterer. If the charterer is not a common carrier then there has never been any person acting as a common carrier in the present case notwithstanding the actual relations of the charterer to the shippers were obviously those of a common carrier. Indeed this Court held in *Isbrandtsen-Moller Company* v. *United States*, 300 U. S. 139, that this petitioner is a common carrier. Yet the Circuit Court of Appeals, in conflict with that decision, has held in this case that the charterer (the petitioner) is not a common carrier but a forwarder or broker whom the cargo owners indemnify for any expenses, and who, when the vehicle owner supplies an unfit vehicle, can recover damages from the vehicle owner only as agent of the goods owners, or who becomes a "volunteer" if he himself incurs expense in transshipping the goods on a fit vehicle on the unfitness of the vehicle supplied being discovered. This Court recently held in *Acme Fast Freight* v. *United States*, 309 U. S. 638, and in *United States* v. *Trucking Co.*, 310 U. S. 344, that the companies there involved were not common carriers but forwarders because they booked the large lot of individual shipments as a single shipment with a *common* carrier, and had themselves always been regarded by the Government's regulatory commission (the Interstate Commission) as forwarders and not common carriers. The petitioner in the present case, on the contrary, shipped the full cargo as a single shipment with a *private* carrier, and has always been regarded by the United States Maritime Commission as a common carrier and not a forwarder. And, as already indicated, in a case involving an administrative interpretation by the Maritime Commission of this petitoner's legal status, this Court has already held that this petitioner is a common carrier. *Isbrandtsen-Moller Company* v. *United States*, 300 U. S. 139. And Congress at this very moment is considering legislation (Bill S. 210 to add

a new Section IV to the Interstate Commerce Act) to avoid this Court's decisions in the *Trucking Company* and *Acme Fast Freight* cases on the factual ground that the new type of forwarder there involved is a common carrier or independent contractor. In the Congressional Record, issue of October 23, 1941, page 8423, when the House Committee reported the legislation, the facts constituting the change in status of the companies there involved from forwarder to carrier, and the necessity of legislation for clarifying present-day actual legal relations in shipping contracts, were stated as follows (Congressional Record, issue of October 23, 1941, p. 8423):

> "The last decade has seen the growth of those forwarders which, in the pursuance of a public business for profit, issue bills of lading, take possession of shipments, assume responsibility for collection and delivery of the shipments as well as for loss and damage, issue freight bills, make a single charge for a complete service from origin to destination, and collect charges in their own behalf. Whether under their bills of lading or shipping receipts they undertake to transport or only to cause to be transported by others, such forwarders appear to incur the liability of a common carrier to the owner of the goods, although bearing the relation of shipper to the carrier performing the actual carriage of the goods. * * *
>
> The principal characteristic of the service of forwarders of the modern type is the expedited movement of freight which they obtain * * *."

The petitioner is a New York corporation, which has for many years been one of the principal common carriers of goods in liner service from New York, Philadelphia and Chester to European ports, operating as the Maersk Line on a regular schedule of publicly advertised fortnightly sailings. Like many other carriers operating

out of New York, it does not own most of the vessels it uses, but charters them from their owners for the carriage of a full cargo of any lawful merchandise for it on "a transatlantic voyage across" from New York and Philadelphia to European ports on an express written promise by the shipowners that the vessels will be thoroughly seaworthy in all respects at the time they are tendered or delivered to it at Philadelphia or New York for loading. The owners of the vessels employ and manage the officers and crews and remain in possession of the vessels at all times, and assume by contract with petitioner all obligations and expense in connection with seeing to it that the vessels are in fact seaworthy at the time they are tendered to petitioner for loading. The petitioner loads and discharges the cargoes of the vessels and supplies the fuel oil for the transatlantic voyage, and pays compensation or charter hire in advance on a time or calendar month basis directly to the shipowners in full settlement to them for all of the vessels' services, and the only contractual relations of the shipowners are with the petitioner. The petitioner, however, enters into contracts of its own with the public or numerous third party American shippers, and thus assembles on the docks at New York and Philadelphia the full cargo which the shipowner has agreed to carry for it. So far as the shipowner is concerned, the petitioner is the only shipper, and the only person with whom the shipowner has at any time any contractual relations or obligations. (The respondents admitted in their answer that the cargo was shipped by the libellant, the petitioner in this Court.) Neither the contracts between the petitioner and the third party shippers nor the bills of lading issued by petitioner to those third parties even mention the owner of the ship, nor does the charter-party or contract between petitioner and the shipowner give the shipowner any rights

or benefits under those bills of lading or contracts between petitioner and the third parties.

On the above-mentioned terms, on December 7, 1938, at New York, the respondent shipowners chartered their vessel, the "Toledo", to petitioner for the carriage of a full cargo for it on a "transatlantic voyage across" from North Atlantic ports (designated as New York, Philadelphia and Chester) to Europe, and expressly promised in writing that the vessel would be thoroughly seaworthy in all respects at the time of her delivery to petitioner at Philadelphia for loading. The petitioner, accordingly, advertised her for a sailing from New York on December 23, 1938 for European ports and assembled a full cargo for her on the docks at New York, Chester and Philadelphia, and on her delivery to petitioner at Philadelphia on December 15, 1938, loaded the small Philadelphia part of the cargo, and shortly afterwards at Chester loaded the small Chester part of the cargo, and issued its own bills of lading to the third parties owning those parts of the cargo, and then instructed the vessel to proceed to New York to complete loading the remainder or major part of the cargo there. On arrival of the vessel at New York, petitioner was informed by the master of the vessel, representing the respondent shipowners, that the vessel was so seriously unseaworthy that she could not be made seaworthy for at least thirty days (the renewals and repairs actually took almost two months), and both courts below have found as a fact that the vessel had been unseaworthy and unfit for the service ever since she was tendered or delivered to petitioner at Philadelphia on December 15, 1938 as being supposedly seaworthy and ready for the transatlantic voyage. It would take only about thirteen days after completion of loading cargo for the entire contract voyage to destination to be completed by a seaworthy vessel. The petitioner ac-

cordingly declined to continue loading cargo on a ship known to be so seriously unseaworthy, and personally incurred large out-of-pocket expenses because of the unseaworthiness in getting other vessels to carry the cargo to destination. It brought this suit in its individual capacity as charterer (the first cause of action in the libel) to recover those expenses from the defaulting shipowners in so far as they exceed the expense which petitioner would in ordinary course have incurred if the unseaworthy vessel had carried the cargo to destination. It added a second and independent cause of action in which it sued in its capacity as bailee of cargo and assignee of third parties' claims against the respondent shipowners for the independent damages sustained by them from the vessel's unseaworthiness, which existed at the time their goods were received for loading.

The Circuit Court of Appeals in the first half of its opinion "assumed" (122 Fed. (2d) 257), and therefore must be regarded as holding, as follows:

1. The respondents were required by the terms of the charter party to carry a full cargo for petitioner to Europe, and to deliver to the petitioner a seaworthy ship for that purpose.

2. In breach of the charter party they delivered an unseaworthy ship.

3. The petitioner had a legal right to reject her.

4. The petitioner did reject her.

5. The respondents thereupon became under a duty to immediately obtain and deliver to petitioner a seaworthy ship to get the cargo forward to destination.

6. Notwithstanding this was demanded, they failed to do so, and took the legally-untenable position that they were not required by the charter party to deliver a seaworthy ship.

7. The petitioner thereupon incurred expenses in performing the respondents' duty of getting the cargo forward to destination on a seaworthy ship, which were in excess of the expenses it would have incurred if the ship which petitioner delivered had been seaworthy and had carried the cargo.

8. The petitioner brought this suit (the first cause of action in the libel) to recover those expenses from respondents.

The Circuit Court of Appeals, instead of stopping its opinion and decision at that point, and awarding petitioner those damages, as it should have done, then proceeded to exonerate the respondents from liability for any damages whatever, and dismissed the libel, on the following two inconsistent theories:

First Theory of the Circuit Court of Appeals.

1. The petitioner, although legally entitled to reject the unseaworthy ship, was not required by independent contracts it had entered into with third persons to do so, and was therefore "*a volunteer*" in forwarding the cargo on a seaworthy ship, and is therefore not entitled to recover from the respondents the expense it incurred as a result of the latter's breach of charter party with it.

Second and Inconsistent Theory of the Circuit Court of Appeals.

2. The petitioner in incurring the transshipment expense was not a volunteer but *an agent of third party cargo owners*, because as to the two small parts of the cargo loaded on the unseaworthy ship at Philadelphia and Chester before her arrival at New York, the petitioner had entered into independent contracts with various third persons, owners of the goods included in the cargo which petitioner was shipping, consisting of so-called charterer's bills of lading, in which it reserved, as between it and the third persons, the privilege of transshipment at their expense, and promised only to supply them a ship which would be seaworthy in so far as exercise of due diligence would make her so, and such due diligence had in fact been exercised although the ship was unseaworthy. And on December 31, 1938, after the unseaworthiness had been discovered and all of the cargo had been transshipped by petitioner on a seaworthy vessel "between December 27th and December 31st", the petitioner had written letters to the third party cargo owners stating that it would waive all of its claims against them for reimbursement of transshipment expense or otherwise, excepting the original agreed freight payable to it for carriage on the unseaworthy ship, if they would sign the enclosed usual admiralty form of assignment to petitioner of their claims against respondents for having tendered an unseaworthy ship for loading, so that those claims could be included in a second cause of action. The assignments contained the usual recital that the transshipment expense would be, as between charterer and cargo owners, for cargo owners' account, which is necessarily inserted for the purpose of negativing any admission by the charterer that it will itself be liable to the cargo owners in case in the litigation

between charterer and shipowners the shipowners are held by the Courts to be under no duty to deliver a seaworthy ship.

Although there was no clause in the charter party or in the charterer's bills of lading giving the shipowners the benefit of those independent contracts between petitioner and the third party cargo owners, the Circuit Court of Appeals held that the respondent shipowners were nevertheless entitled to the benefit of them so as to escape liability to petitioner for having breached the charter party by delivering an unseaworthy ship, and were legally justified in taking the position that the cargo owners, had thus, evidently as insurers, by the above-mentioned "letters and assignments", or contracts with petitioner, assumed all liability of respondents to petitioner to reimburse the latter for expense incurred in getting the cargo forward to destination on a seaworthy ship, and that the petitioner in incurring the expense was therefore not "a volunteer" but *an agent of the third party cargo owners*. This was obviously a holding, in substance, that the respondents were entitled to the benefit of insurance contracts which the petitioner had effected with third parties, and were thus entitled to escape paying the damages for which respondents were concededly liable to petitioner. The Circuit Court of Appeals then proceeded to hold, further inconsistently, that the third party cargo owners could not recover those expenses incurred by petitioner, supposedly on their behalf, from respondents because the respondents had no contract with the third party cargo owners and did not owe them the contractual duty it owed to petitioner, the respondents' only contract being the charter party entered into with petitioner.

The Circuit Court of Appeals by its decision in this case has announced a new rule that when a partly-loaded

ship is found to be so unseaworthy that the transshipment of the cargo at the shipowners' expense on another ship is legally required by the shipowners' contract with the charterer, the shipowners can nevertheless escape liability by simply failing to transship, and the law renders the charterer powerless to transship because if it does so it is a "volunteer" (122 Fed. 2d. at p. 257) and cannot recover from the owners of the unseaworthy ship the excess of the charterer's transshipment expense over the expense it would have incurred during the voyage if the original ship had been seaworthy and had carried the cargo. This part of the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in *The Caledonia*, 157 U. S. 124, *The Carib Prince*, 170 U. S. 655, and *The Edwin I. Morrison*, 153 U. S. 199, and deprives the rules there announced by this Court of any practical usefulness. The Circuit Court of Appeals holds that notwithstanding the ship was so unseaworthy that the charterer was legally justified in rejecting her under the rule laid down in *The Caledonia*, 157 U. S. 124, because she was not in accordance with the express charter party requirement that she be seaworthy, nevertheless the transshipment expense to destination on a seaworthy ship thus necessitated must be borne by the wholly-innocent charterer as "a volunteer". The Court ignores the elementary rule that the victim in doing what the defaulting wrongdoers should have done in getting the cargo forward to destination on a seaworthy ship, is acting as agent of the wrongdoers and for their account in incurring the transshipment expense in excess of the charterer's normal voyage expense.

The Court then inconsistently goes on to hold that in incurring the transshipment expense the charterer was not acting as a volunteer, but as agent of the third party cargo owners who had entered into contracts only with

it, and on this new basis concludes that the transshipment expense paid by the charterer must be borne by those innocent third parties, and cannot be recovered through the charterer's suit on their behalf in the libel's second cause of action, or on the charterer's own behalf in the first cause of action, because of clauses in those contracts giving the charterer the privilege of transshipment at the cargo owners' expense, or because of a recital in the written assignments to the charterer of the cargo owners' claims against the shipowners that the transshipment expense is for cargo owners' account. But in construing those assignments as matter of law the Court was obviously in error because the charterer's letters annexed to the assignments and transmitting them for signature state specifically that the charterer relieves the cargo owners from liability to pay any part of the transshipment expense to the charterer in consideration of their assigning their claims against the shipowners to it. The cargo owners, therefore, never assumed any liability to pay those expenses, and have never in fact paid them.

The Circuit Court of Appeals decided that the action of the charterers after the unseaworthiness was discovered, in obtaining the privilege of transshipment at the third party cargo owners' expense so as not to admit any liability of the charterer to them in case the shipowners should be exonerated by the courts from liability for delivering an unseaworthy ship, constituted an insurance or indemnity contract of the cargo owners in favor of both the charterer and the guilty shipowners, or an assumption by the cargo owners of the shipowners' liability to the charterer for breach of charter party, so as to preclude the latter from recovering from the shipowners the transshipment expense in excess of the charterer's ordinary expense on such a voyage. This part of

the decision of the Circuit Court of Appeals is in conflict with this Court's decisions in *The City of Norwich*, 118 U. S. 468, and *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312.

By the decision of the Circuit Court of Appeals, the consequences of the shipowners' breach of contract with the charterer are thrust on the innocent cargo owners or on the equally-innocent charterer. It is the charterer who sustains those consequences in this case because it has incurred and paid the entire expense of forwarding the cargo on other vessels, and it has received from the cargo owners only the ordinary freights due from them to it under the original arrangements for the carriage of the cargo on the vessel which turned out to be unseaworthy. This leaves the charterer out of pocket the excess expenditure necessary to forward the cargo on other vessels, and the present suit has been brought against the shipowners to recover that expense.

Under the two above-mentioned rules of law announced by the Circuit Court of Appeals in this case, the movement of goods to destination is interfered with by new rules of law instead of expedited, and the rules announced long ago by this Court are upset notwithstanding they were designed to expedite the flow of commerce, and are necessary to prevent a cluttering of the docks in our sea ports with cargoes which ought to go forward on other vessels but which the charterers cannot send forward as the economic and legal necessity dictates without, as the Circuit Court of Appeals holds, acting as "a volunteer" or as agent of non-liable third parties, and thus abandoning all legal rights to reimbursement from the shipowners who delivered the unseaworthy ship.

The letters refered to by the Circuit Court of Appeals in its opinion were letters of the petitioner transmitting the mimeographed forms of assignment to the cargo

owners for signature, and are all in the same form, and read in full as follows (Exhibit 42; R., p. 330):

"December 31, 1938

To all Shippers and Owners of Cargo
on board the Motorship 'Toledo'
being transshipped on the Steam-
ship:

Dear Sirs:

While the Motorship 'Toledo' was completing loading her cargo in the port of New York, she was found to have a fracture in her main crankshaft web, which would necessarily delay her sailing until late in January. Under these circumstances we are arranging to transship your cargo on the s/s 'Otto Petersen', which sailed from the port yesterday. We are putting forward a claim against certain third persons whom we believe to be responsible for this trouble. We are very anxious to spare the shippers and consignees of the cargo any annoyance or expense, but in order to prosecute the claim successfully, we must be in a position to proceed not only in our own right, but in the right of the shippers and consignees of the cargo. Accordingly, we request that you send us a letter in the form enclosed, which ratifies our action in transshipping the cargo as your representative, and assigns to us any claims and demands which you may have against the m/s 'Toledo' and/or her owners in consideration of our agreement that the cargo will be delivered to the consignees without any claim for additional freight or for any additional expense whatsoever.

Very truly yours,

ISBRANDTSEN-MOLLER COMPANY, INC.

Enc."

(The letters and the form of assignment to be signed by the cargo owners were sent out by petitioner to the cargo owners on December 31, 1938, and the Circuit Court of Appeals has found that petitioner had already "between December 27th and 31st, discharged the cargo and sent it forward on other vessels." 122 F. 2d at p. 256.)

The assignments referred to by the Circuit Court of Appeals in its opinion, and referred to in the above-quoted letter, are also all in the same form and read in full as follows (Exhibit 41; R., pp. 329-331):

"December 31, 1938

Isbrandtsen-Moller Company, Inc.,
26 Broadway,
New York, N. Y.

Dear Sirs:

In consideration of your discharging our cargo from the Motorship 'Toledo' into the Steamship 'Otto Petersen' and getting it forward promptly to destination on the latter vessel, we confirm that the expense in this connection was incurred by you for our account, and that in consideration of your delivering the cargo at destination without payment of additional freight or reimbursement for this expense, we hereby assign, transfer and set over to you any and all claims, demands and causes of action which we have or may have (either for our own account or in a representative capacity) against any vessel, person or corporation who may be legally responsible for the 'Toledo's' inability or failure to perform the voyage for which she received the cargo.

Very truly yours,

Description of cargo:"

The Circuit Court of Appeals, in interpreting the above-quoted letters and assignments as a waiver by petitioner of its right to recover its own expenses or damages from the defaulting shipowners for breach of charter party, held that the petitioner should recover its expenses resulting from respondents' breach of contract, not from the defaulting respondents but from the innocent cargo owners who are not parties to the suit and who assumedly had agreed independently with petitioner to bear the burden of any damages resulting from respondents' breach and had thus assumed responsibility as an insurer of both respondents and petitioner against all damages resulting from respondents' breach of contract in delivering to petitioner an unseaworthy ship. This part of the Circuit Court of Appeals' decision is plainly in conflict with this Court's decisions in *The City of Norwich*, 118 U. S. 468, and in *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312. The result of the Circuit Court of Appeals' decision is that no one will reimburse, or has reimbursed, petitioner its expenses resulting from respondents' delivery to it of an unseaworthy ship, because obviously under the letters and assignments, the innocent cargo owners are not liable to petitioner for the damages caused to it by the respondents' legal fault in delivering an unseaworthy ship to petitioner for the carriage of the goods. Moreover, it is immaterial on the first cause of action in this suit whether or not the cargo owners, under their independent contracts with petitioner not involved here, were also liable to reimburse petitioner as insurer or otherwise for the expenses of forwarding the cargo on another vessel. The question here is simply whether or not the respondents are liable to petitioner for its expenses incurred as a direct result of having received an unseaworthy ship from respondents in breach of the charter party.

The essential part of the opinion of the Circuit Court of Appeals summarizing the matter involved is as follows:

"The vessel was delivered to the charterer at Philadelphia on December 15, 1938" (122 F. 2d at p. 256).

After the charterer had loaded part of the cargo for the contemplated transatlantic voyage to Europe "a fracture of the No. 3 crankshaft web was discovered. The charterer was immediately notified thereof and stopped the loading of cargo. The following day (December 22, 1938) it was informed that repairs would take thirty days" (122 F. 2d at p. 256).

The charterer "between December 27th and 31st, discharged the cargo and sent it forward on other vessels. By its libel, filed on January 21, 1939, the charterer sought recovery in two capacities: (1) as time charterer, for breach of contract, and (2) as bailee and assignee of cargo for damages sustained by owners of cargo" (122 F. 2d at p. 256).

"Its main claim of damages was for the cost to it of discharging and transshipping cargo" (122 F. 2d at p. 257).

"The charter party contains a recital that hull, machinery and equipment are 'in a thoroughly efficient state', and a promise that on delivery the vessel shall be 'tight, staunch, strong and in every way fitted for the service'. * * * The district judge ruled that under the charter party there was a warranty that the vessel was seaworthy when the charter was made on December 7, 1938 and when she was delivered on December 15th. He found from the evidence that she was not seaworthy at these times. Neither party questions these findings. The cause of her unseaworthiness was defective metal in the No. 3 crankshaft web" (122 F. 2d at p. 256).

Because of an "accident" exception clause, the District Court "* * * ruled that the ship and its owners

were relieved from liability despite the ship's unseaworthiness at the date of making the charter party and the date of delivery of the vessel to the charterer.

The appellant contends that this ruling is contrary to the construction which the Supreme Court has placed on similar exception clauses. *The Caledonia*, 157 U. S. 124; *The Carib Prince*, 170 U. S. 655. The appellees attempt to distinguish those cases on the ground taken by the district judge, namely, that there the warranty of seaworthiness was made by a common carrier while here it is the promise of a private carrier. It may well be doubted whether that distinction is significant when the question is the construction of a contract to determine whether the warranty of seaworthiness is modified by an exception of accidents to machinery which result from preexisting unseaworthiness. The obligation to furnish a seaworthy ship is the same in each case. See *The Edwin I. Morrison*, 153 U. S. 199; *The Addison E. Bullard*, 2 Cir., 287 F. 674. * * * The principles of construction discussed in *The Caledonia*, *supra*, would seem to be equally applicable when the warrantor is a private carrier" (122 F. 2d at pp. 254-255).

If the Circuit Court of Appeals had stopped its opinion at that point (at line 12 on page 257 of 122 F. 2d), it is obvious that it would have reversed the District Court's decision in this case on the ground that it was in conflict with this Court's decisions in the cases of *The Caledonia*, 157 U. S. 124; *The Carib Prince*, 170 U. S. 655, and *The Edwin I. Morrison*, 153 U. S. 199, and would accordingly have approved petitioner's refusal to use, or to continue loading cargo on, a ship known to be seriously unseaworthy, and would have awarded to petitioner the actual damages which it personally incurred as a result of the unseaworthiness of the vessel, and for which it has not been reimbursed by anyone, consisting of the ex-

pense or "the cost to it of discharging and transshipping cargo" to destination on other vessels (122 F. 2d at p. 257), over and beyond the expense petitioner would in ordinary course have incurred in connection with the voyage if the unseaworthy vessel had been seaworthy and had carried the cargo to destination. We earnestly submit that the Circuit Court of Appeals should have stopped its opinion at that point in so far as the first cause of action in the libel is concerned, and that the remainder of its opinion with respect to the first cause of action is entirely incorrect and, indeed, irrelevant because it is based on two mistaken assumptions which the Circuit Court of Appeals then proceeds to make in its opinion when referring to the first cause of action in the libel, and which are themselves based on the further incorrect assumption of law that petitioner was not a common carrier but a mere forwarder. The first assumption it makes is as follows:

> "The theory of the charterer on this claim is that in transshipping the cargo it was mitigating the damages which the cargo owner would have against it; thereby reducing the claim it would have in indemnity against the respondent" (122 F. 2d at p. 257).

That is a wholly-incorrect assumption. No such theory was ever advanced by the charterer in the first cause of action or in any of its pleadings, briefs, or oral argument in either court below, nor was any such theory or contention ever advanced in either court below by respondents. The theory of the charterer, the petitioner, at all times, and by specific allegation in Articles 18 and 19 of the first cause of action in the libel, has been that in forwarding the cargo on other vessels it was mitigating the damages for which the defaulting respondents (not the innocent cargo owners) were liable to it; thereby reducing the claim petitioner had against *the respondents*.

The second assumption of law which the Circuit Court of Appeals then proceeds to make in its opinion is that "the letters and assignments obtained from the cargo owners expressly recognize that the expense of transshipment was for the cargo owner's account" (122 F. 2d at p. 257). That assumption is correct only in case the respondent shipowners should not be liable for breach of their obligation under the doctrine of the *Caledonia* case to deliver to petitioner a seaworthy ship. If the respondents were so liable, then, under the letters and assignments, the transshipment was obviously for the defaulting respondents' account in mitigation of petitioner's damages resulting from the respondents' breach of the charter party.

Furthermore, the Circuit Court of Appeals made in substance the same mistake as the District Court and reached the same result of violating the *Caledonia* doctrine by going on to hold finally that no damages were recoverable by petitioner for the respondents' breach of the obligation to deliver a seaworthy ship, notwithstanding the clear violation by respondents of this Court's rule as announced in the *Caledonia* case. In practical effect there is no difference between the District Court's rejection of the *Caledonia* rule and the Circuit Court of Appeals' recognition of the applicability of the rule but refusal to award petitioner its expenses or damages resulting from respondents' violation of the rule. It is important to note that the Circuit Court of Appeals failed to award petitioner the expenses it incurred from the unseaworthiness, not because no damages had been actually sustained by petitioner, but because the expenses which petitioner personally incurred as a result of the unseaworthiness in getting the cargo forward to destination on other vessels, and for which it has never been reimbursed by any one, were supposedly incurred by it as agent of the innocent third parties who owned the cargo and not as agent of the

defaulting respondent shipowners whose delivery to petitioner of an unseaworthy ship in violation of their obligation under the doctrine of the *Caledonia* case had caused the necessity for the forwarding of the cargo on other vessels. The Circuit Court of Appeals evidently overlooked the fact that under the letters and assignments obtained by petitioner from the cargo owners the expense of transshipment would be for the cargo owner's account only in case the respondent shipowners should not be liable to petitioner and the cargo owners for breach of the doctrine of the *Caledonia* case by delivering to petitioner an unseaworthy ship. In the letters and assignments the cargo owners, in the ordinary way that is always done in these admiralty cases, transferred their claims to petitioner who sued on them in the second cause of action. But that obviously did not mean, as the Circuit Court of Appeals erroneously holds, that the cargo owners were waiving their or petitioner's rights against the defaulting shipowners, or were assuming the shipowners' liability for having delivered the unseaworthy ship, or were insuring the respondent shipowners against their liability to petitioner for delivering an unseaworthy ship. The language of the letters and assignments is perfectly plain that all rights of petitioner and the cargo owners against the respondent shipowners for delivering an unseaworthy ship to petitioner and the cargo owners are preserved and are to be enforcible by petitioner directly against respondents. Assuming, as the Circuit Court of Appeals did, the respondent shipowners were liable for breach of the *Caledonia* doctrine by delivering to petitioner an unseaworthy ship, then it necessarily follows as matter of elementary law that in exercising its duty to mitigate the damages by forwarding the cargo to destination on other vessels on as economical terms as possible the petitioner was acting as agent of the defaulting respondent shipowners and not as agent of the wholly-innocent cargo owners who owed

no obligation to insure the shipowners against the damages caused to petitioner by the shipowners' default. And this is alleged, strictly in accordance with long-established admiralty practice in such cases, in precise language in Articles 18 and 19 of the first cause of action in the libel. The decision of the Circuit Court of Appeals in this case is in effect a holding that the innocent cargo owners were insurers of the respondents' liability to petitioner for breach of charter party, and are liable for the damages caused to petitioner by the respondent shipowners in delivering an unseaworthy ship. The unsoundness of the decision is evident from the fact that the first cause of action in the libel is a suit by the petitioner, as charterer, against the respondent shipowners for breach of the charter party obligation to petitioner, and the respondents have never set up any defense in their answer that they are relieved of liability for petitioner's damages because the cargo owners had supposedly insured them or petitioner against the results of respondents' default under the charter party. And in their answer to that cause of action the respondents expressly admitted that the cargo was shipped only by petitioner, and the respondents repeatedly took the position in the courts below that no recovery could under any circumstances be had under the first cause of action, by way of indemnity to petitioner or otherwise, for any damages sustained or expenses incurred by third parties with whom petitioner had contracted but with whom respondents had not contracted, and the District Court expressly recognized and held at the trial that that position was sound and that the damages and expenses recoverable under the first cause of action were only those which petitioner had itself sustained or incurred. Yet the Circuit Court of Appeals assumes the exact opposite and mistakenly bases its decision on the assumption that under the first cause of action the peti-

tioner cannot recover the damages or expenses it itself sustained or incurred but only those which third parties sustained and for which petitioner is supposedly asking indemnity.

The first cause of action is stated in Articles 1 to 23 of the libel. Articles 18 and 19 of the libel read as follows (R., pp. 20-21):

> "Eighteenth: Because of the aforesaid breaches by respondent of its promises to libellant in said charter party of the Motorship 'Toledo', the libellant, in the exercise of ordinary care on respondent's behalf and on behalf of and at the demand of the cargo owners, in order to mitigate the damages for which respondent was liable, was compelled to discharge the part cargo already loaded on the 'Toledo' and to send forward or transship it and the remaining unloaded cargo to destination by carrying part of it on another vessel, the Motorship 'Tonsbergfjord', operated in libellant's regular liner service, and by delivering the remainder of said cargo to another reputable shipowner for carriage pursuant to the same aforesaid form of charter party on another vessel, the Danish Steamship 'Otto Petersen', on the voyage to London, Rotterdam and Antwerp which respondent had contracted as aforesaid with libellant to perform but had wholly failed to perform by supplying a vessel, the 'Toledo', which at the time she was tendered for service was seriously unseaworthy and unfit for a transatlantic voyage. The libellant, because of said breaches of charter party by respondent, was compelled in effecting said transshipment, to assume and incur, on respondent's behalf and for respondent's account, additional risks, hazards and liabilities, and to incur and expend numerous additional expenses, freights, and damages beyond those that would have been incurred or expended by libellant

if the respondent had properly performed the said charter party of the Motorship 'Toledo'.

Nineteenth: By reason of the premises, the libellant has sustained damages amounting, as nearly as the same can now be ascertained or estimated, to the sum of One Hundred Thousand ($100,000.00) Dollars, no part of which has been paid by respondent, although duly demanded, and payment has been refused by respondent."

The District Court, referring at the beginning of the trial to the pleadings, said (R., pp. 191-192):

"The Court: I think if you recovered anything it would be any expense you have been put to. I think you can recover more than that. I think as bailee you can recover anything the cargo owner could recover, * * *.

The Court: You have two causes of action.

Mr. Ryan: * * * The whole thing that is important is the charter party * * *. In other words, whatever we recover are our damages or expenses, which does not have to be turned over to the shippers.

The Court: As to that I agree with you. I think we will go along with it as it is. I may be wrong. This is my opinion, that as charterer your right of recovery is based on the contract they (the respondents) made with you.

Mr. Ryan: That is right.

The Court: As bailee of the cargo your right to recovery is the right the cargo owner would have had, *what you paid out. You did not pay out as bailee of cargo, you paid that out as charterer.* * * *

The Court: That is my opinion. * * *

Mr. Griffin: I do not understand Your Honor is making a final ruling on the first cause of action?

The Court: No. That is my opinion generally on the right to plead the *fourth* (first) cause" (R., p. 192).

(The italicized portion of the above quotation has obviously been incorrectly punctuated by the Court Reporter and should read: "What you paid out you did not pay out as bailee of cargo. You paid that out as charterer." And the words "fourth cause" should obviously be "first cause" because there are only two causes of action in the libel, and the subject asked about in the question being answered was "the first cause of action").

The Questions Presented.

Three fundamental questions are presented:

The first question presented is whether petitioner is a common carrier, or is a mere volunteer or a forwarder or agent of third party cargo owners who brings together the private carrier shipowner and the third party owners of the various lots of goods making up petitioner's cargo, and then drops out of the picture without ever having been a common carrier and with no right to sue, or liability to be sued by, the shipowners or the cargo owners with respect to the obviously unseaworthy vessel which the respondent shipowners tendered for loading under the charter party.

The second question presented is whether or not the respondents, who, according to the Circuit Court of Appeals, have breached their contract with petitioner by delivering to it an unseaworthy ship, are exempted by law or legal fiction from paying to petitioner the expenses or damages it has incurred therefrom by performing respondents' duty of promptly obtaining a seaworthy ship and carrying the cargo to destination, on the theory that the issuance by petitioner of its bills of lading or cargo receipts to third parties, or the signing by the wholly-innocent third party cargo owners of assignments to petitioner of their own additional claims against respondents, and their statement in the assignments that, as between them and petitioner, the trans-

shipment expense is for their account (although they never pay it), make the third party cargo owners nevertheless insurers of respondents or of petitioner so as to relieve the respondents from having to pay any damages resulting to petitioner from respondents' conceded legal fault. The exact opposite of the Circuit Court of Appeals' decision on this point was decided by this Court in *The City of Norwich*, 118 U. S. 468, and in *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312.)

The third question presented is whether or not the petitioner was required to accept and use, and continue loading cargo on, a ship which was known to be so unseaworthy that she could not possibly be repaired or be fit to sail for almost two months. Both courts below have held in effect that petitioner was required to do so, although they differ in their reasons. The District Court held that petitioner was required to use the unseaworthy ship and continue loading on her because the respondents had not promised to deliver a seaworthy ship. The Circuit Court of Appeals held that the District Court's decision was erroneous on this point as matter of law because it was in conflict with this Court's decision on similar facts in the cases of *The Caledonia*, 157 U. S. 124, *The Carib Prince*, 170 U. S. 655, and *The Edwin I. Morrison*, 153 U. S. 199. The Circuit Court of Appeals itself actually reached the same result, however, by then proceeding to hold in substance that the petitioner must accept and use, and continue to load cargo on, the unseaworthy ship because it will not be permitted to recover any part of the expenses it personally incurs in getting the cargo forward promptly to destination on other vessels. This conclusion of the Circuit Court of Appeals is based on the incorrect assumption that the petitioner cannot, under the rule announced by this Court in the *Caledonia* case, recover from the respondents any ex-

penses it personally incurs, but only expenses which third parties may incur and claim against petitioner. This holding is further based on the wholly erroneous assumption by the Circuit Court of Appeals that petitioner in its first cause of action in the libel is suing, not for its own expenses incurred as a result of the unseaworthiness, but for an indemnity for claims against petitioner by third parties under contracts to which respondents were not parties and which were not entered into until after respondents' breach had occurred, and which were not entered into for respondents' benefit, and which petitioner would assumedly (by the Circuit Court of Appeals) not breach by continuing the loading of cargo on the unseaworthy vessel. It is obvious from an examination of the libel that the first cause of action makes no claim or prayer for such indemnity against claims of third parties, and actually prays only for petitioner's own damages as charterer, consisting of the extra expense petitioner as sole shipper and charterer was put to personally in getting the cargo forward to destination promptly on other ships after the respondents had breached their express promise to petitioner that the ship tendered by them would be seaworthy at the time of delivery. The decisions of both Courts below are therefore flatly in conflict with the decision of this Court in the *Caledonia* case that under a contract like this a shipowner is required to deliver a ship which is seaworthy at the time of loading and sailing, and is liable to the charterer for the charterer's own damages and expenses sustained as a result of the delivery of an unseaworthy vessel.

The Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals in this case is on a matter of great present-day commercial importance in view of its announcing a new rule that

American shippers who ship their goods with a charterer who has publicly put a vessel on the berth for the general carriage of goods after having chartered her from a private carrier shipowner who remains in possession through his crew, have no legal relations as shipper and common carrier with either charterer or shipowner, because they have no contract with the shipowner either as common carrier or private carrier and because, according to the Circuit Court of Appeals, the charterer is not a common carrier or independent contractor but an agent of the various shippers, *i. e.*, a forwarder, or is "a volunteer", in getting the cargo forward to destination on a seaworthy ship when the shipowner breaches his contract with the charterer by tendering an unseaworthy ship for loading. The practical effect of the new rule is that neither the shipowner nor the charterer has any contractual duty to transship the cargo after an unseaworthy ship has been tendered for loading in a case, such as the present, in which the charterer does not by contract make to the shippers the promise that the shipowner made to the charterer that a seaworthy ship will be tendered for loading. The new rule makes of no practical or legal effect the shipowner's express promise to the charterer to tender a seaworthy ship, and leaves the charterer and the shippers with no recourse but to continue loading their goods on a ship known to be seriously unseaworthy, or else pay double freight by transshipping the goods on a seaworthy ship at their own expense. A more detrimental rule of law in its effect on American commerce and in its tendency to create cargo congestion on docks and on unseaworthy ships in American ports could hardly have been invented.

2. The decision of the Circuit Court of Appeals in this case is in conflict with the decisions of this Court in:

(a) *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, in which this Court held that this petitioner is a common carrier subject to regulation by the Maritime Commission under the common carrier sections of the Merchant Marine Act, 1936, and not a mere agent of cargo owners;

(b) *Acme Fast Freight* v. *United States*, 309 U. S. 638, and *United States* v. *Trucking Co.*, 310 U. S. 344, in which this Court held that a company carrying on business like this petitioner is not a forwarder or agent of cargo owners but a common carrier when it ships as a single shipper on a private carrier (not a common carrier), and is recognized by administrative interpretation by the Government's Regulatory Commissions as a common carrier;

(c) *The Caledonia*, 157 U. S. 124; *The Carib Prince*, 170 U. S. 655, and *The Edwin I. Morrison*, 153 U. S. 199; and

(d) *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312, and *The City of Norwich*, 118 U. S. 468.

Respectfully submitted,

ISBRANDTSEN-MOLLER COMPANY, INC.,
By JAMES W. RYAN,
Counsel for Petitioner.

JAMES W. RYAN,
Of Counsel.